Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1995

GREAT STATE BEVERAGES, INC.,

Petitioner,

v.

DAVID WENNERS,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of New Hampshire

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

A. Whether the Supreme Court of New Hampshire's recognition of a state common law cause of action for public policy wrongful discharge for alleged bankruptcy discrimination is unconstitutional and in violation of the Bankruptcy Uniformity Clause, U.S.Const., Art.I, §8, cl.4, and/or Sections 525(b) and 105(a) of the United States Bankruptcy Code, 11 U.S.C. §§101, *et seq.*

B. Whether the Bankruptcy Uniformity Clause, U.S.Const., Art.I, §8, cl.4, and/or the Supremacy Clause, U.S.Const., Art.VI, cl.2, preempt a state common law cause of action for public policy wrongful discharge for alleged bankruptcy discrimination, when the public policy allegedly violated is found in the prohibition against bankruptcy discrimination of Section 525(b) of the United States Bankruptcy Code, 11 U.S.C. §§101, *et seq.*

RULE 29.6 LISTING

Petitioner Great State Beverages, Inc. is a New Hampshire corporation. Great State has no publicly traded shares or stock and has no parent or wholly owned subsidiary corporations whose shares or stock are publicly traded.

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Petitioner Great State Beverages, Inc. respectfully petitions that a writ of *certiorari* be issued to review the judgment of the Supreme Court of New Hampshire in this case.

OPINIONS BELOW

The opinion of the Supreme Court of New Hampshire is reported at 663 A.2d 623 (N.H. 1995) and is reproduced at App. 1a-6a. The opinion of the Hillsborough County Superior Court of New Hampshire is reproduced at App. 7a-11a.

JURISDICTION

Petitioner Great State Beverages, Inc. ("GSB") seeks a writ of *certiorari* for a decision entered on August 4, 1995 by the Supreme Court of New Hampshire. The Supreme Court of New Hampshire denied GSB reconsideration of its decision on September 14, 1995. App. 12a. On November 6, 1995, Associate Justice David H. Souter granted GSB an extension of time within which to file its Petition to and including January 16, 1996. App. 35a-36a. Jurisdiction is invoked pursuant to 28 U.S.C. § 1257.

STATUTES INVOLVED

U.S. Const. Art. I, § 8, cl. 4 states, in relevant part:

> The Congress shall have Power To . . . establish . . . uniform Laws on the subject of Bankruptcies throughout the United States; . . .

U.S. Const. Art. VI, cl. 2, states, in relevant part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

United States Bankruptcy Code, 11 U.S.C. § 105(a), provides:

> The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

United States Bankruptcy Code, 11 U.S.C. § 525(b), provides:

> No private employer may terminate the employment of, or discriminate with respect to employment against, an individual who is or has been a debtor under this title, a debtor or

bankrupt under the Bankruptcy Act, or an individual associated with such debtor or bankrupt, solely because such debtor or bankrupt –

(1) is or has been a debtor under this title or a debtor or bankrupt under the Bankruptcy Act;

(2) has been insolvent before the commencement of a case under this title or during the case but before the grant or denial of a discharge; or

(3) has not paid a debt that is dischargeable in a case under this title or that was discharged under the Bankruptcy Act.

STATEMENT OF THE CASE

A. Introduction.

This case presents important issues concerning the construction and scope of the Bankruptcy Uniformity and Supremacy Clauses of the Constitution in the context of employment discrimination. This case also presents the important issue of whether a state court can recognize a state common law cause of action for wrongful discharge in violation of federal public policy when the public policy in question is allegedly found in, but is not consistent with, Section 525(b) of the United States Bankruptcy Code. This case further presents a conflict between the decision appealed from and one from the United States Court of Appeals for the Ninth Circuit in a similar matter as well as this Court's precedents on the uniformity and exclusivity of Congressional bankruptcy enactments.

In practical terms, the Supreme Court of New Hampshire's decision must be reviewed because it sets a precedent for each state to fashion its own cause of action for discrimination based on bankruptcy status, with its own peculiar elements, procedures, remedies and underlying public policy, all in complete derogation of the Constitution, Section 525(b), judicial precedent and federal public policy.

B. Factual Background.

Respondent David Wenners ("Wenners") worked for GSB until on or about July 24, 1991. During the course of his employment, Wenners sought and received protection under the United States Bankruptcy Code ("Code" or "Bankruptcy Code"), 11 U.S.C. §§ 101, *et seq.* App. 2a, 7a, 21a.

On or about February 12, 1993, Wenners filed a Complaint in the Hillsborough County Superior Court of New Hampshire alleging under New Hampshire common law that GSB wrongfully terminated his employment because he had sought and obtained relief under the Bankruptcy Code and because he had refused to transfer assets in violation of the Code. App. 21a. Wenners further alleged under New Hampshire common law that GSB's decision to terminate him due to his bankruptcy claim was motivated by bad faith, malice or retaliation, that public policy encouraged debtors to seek bankruptcy relief and that public policy condemned debtors' unlawful transfer of

assets.[1] App. 21a. Wenners sought a broad array of damages from GSB. App. 21a-22a.

Because of the federal question obvious in Wenners' Complaint, GSB attempted to remove the case to the United States District Court for the District of New Hampshire. However, the removal was not timely filed by prior local counsel, and that court remanded the case back to the Hillsborough County Superior Court. GSB then filed a motion to dismiss Wenners' Complaint on the grounds that Wenners' claim was barred by the Bankruptcy Uniformity Clause and/or preempted by the Supremacy Clause of the Constitution, that if Wenners had a claim at all, it arose exclusively under Section 525(b) of the Bankruptcy Code, 11 U.S.C. § 525(b), and that Wenners' claim was not cognizable under New Hampshire common law. App. 23a-27a.

C. The Decisions Below.

The courts below accorded no authority to the constitutional mandates that the laws of the United States, including the Constitution, be treated as the supreme law of the land and that Congress is empowered to establish, and has established, a uniform national bankruptcy law pertaining to employment discrimination. The courts below also ignored this Court's precedents on the uniformity issue. Through this petition, GSB seeks for the Court to restore the supremacy of the Constitution and the exclusivity of the Code and to stop the courts of New

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[1] GSB posits that Wenners was separated from employment for other, unrelated reasons.

Hampshire (and any others tempted to follow their lead) from fashioning their own non-uniform state common law bankruptcy employment discrimination laws and their own public policy with respect thereto.

1. The Trial Court's Decision.

On September 22, 1993, the Hillsborough County Superior Court denied GSB's motion to dismiss on the ground that the Constitution's bankruptcy uniformity mandate:

> . . . does not prohibit the recognition of state laws which "do not treat commercial transactions in a uniform manner." *Railway Labor Executives Ass'n v. Gibbons*, 102 S.Ct. 1169, 1176 (1982). This is so even if such recognition leads to different results in different states. *Id.* Nor does the uniformity requirement compel states to eliminate any differences "in their law governing commercial transactions." *Id.* Thus, the recognition of a state common law wrongful discharge claim, which on its surface does not touch upon bankruptcy law, is not necessarily an impediment to the Bankruptcy Clause's uniformity requirement.

App. 9a. The court's citation to *Railway Labor Executives' Association v. Gibbons*, 455 U.S. 457 (1982), was misplaced because the quoted statement pertained to *Congress'* power to recognize state laws which "do not treat commercial transactions in a uniform manner." *Id.* at 469. Furthermore, Wenners' Complaint, on its face, invokes the Bankruptcy Code. App. 21a.

On the issue of preemption, the court held that:

> . . . [a] common law discharge complaint does not contravene the purposes of 11 U.S.C. § 525(b). . . . Nor would recognition in this area create a conflict. Assuming, arguendo, that the plaintiff's termination was in fact because he sought relief under the Code and/or refused to unlawfully transfer assets, then the common law wrongful discharge claim would merely supplement, rather than frustrate, the remedy provided under the federal statute.

App. 10a-11a. The court failed to recognize that Wenners' claim involved a public right at the core of Congress' bankruptcy power to implement and enforce a limited "fresh start" policy for debtors and so at the core of the constitutional uniformity mandate. *Perez v. Campbell*, 402 U.S. 637, 648 (1971); *Morrow v. Torrance Bank*, 1995 W.L. 707392 at *15 (Bankr.C.D.Cal. 1995). To wit, absent having sought bankruptcy relief prior to the termination of his employment, Wenners would have had no state common law claim to assert, since the sole source of his claim *is* the "public policy" set forth in 11 U.S.C. § 525(b) that employees may not be discriminated against solely due to their bankruptcy status. App. 6a, 21a.

2. The State Supreme Court's Decision.

On December 21, 1993, GSB filed an interlocutory appeal with the Supreme Court of New Hampshire. On August 4, 1995, that court affirmed the denial of GSB's constitutionally based motion to dismiss. Although the issue was squarely raised on appeal, the Supreme Court of New Hampshire ignored the bankruptcy uniformity

issue and addressed limited aspects of the preemption issue as well as the contours of New Hampshire's common law cause of action for wrongful discharge in violation of public policy. App. 1a-6a. The Court's refusal to treat the bankruptcy uniformity issue put its decision in direct conflict with *International Shoe Co. v. Pinkus*, 278 U.S. 261 (1929).

On the matter of express preemption, the Supreme Court of New Hampshire said:

> . . . the Bankruptcy Code reveals nothing that triggers an express preemption of state common law claims for wrongful termination based on section 525(b).

App. 4a.

On the matter of implied preemption by occupation of the field, the court found the relevant "field" to be employment discrimination, declared that Congress had not occupied it and concluded, therefore, that "Congress' intent to preempt must be 'clear and manifest.' " App. 5a.

On the matter of implied preemption by actual conflict with the right afforded by Section 525(b) and the remedy afforded by Section 105(a), the court held:

> The prohibition in section 525(b) and a State law cause of action for wrongful termination based on the public policy set forth in that section are not incompatible; in fact, they are complementary. A wrongful termination claim relying on section 525(b) would further the goals of Congress to protect debtors from discrimination and ensure that all property that belongs in the estate remain in or be returned to the estate. *See* 11 U.S.C. §§ 525(b), 542 (1988). That a cause of

> action under State common law may offer the plaintiff a greater remedy than does the Bankruptcy Code does not affect our analysis. *English*, 496 U.S. at 89. ("[O]rdinarily, state causes of action are not pre-empted solely because they impose liability over and above that authorized by federal law." (quotation omitted)).

App. 5a-6a. *Contra, Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19 (1979) (where statute expressly provides remedy [such as Section 105(a)], courts should be especially reluctant to provide additional or different remedies); *Cort v. Ash*, 422 U.S. 66, 78 (1975) (implied private right of action may be inferred from statute that contains no express private right of action).

The state court's preemption rulings (i) incorrectly rendered Section 525(b) a toothless nullity; (ii) violated the principle that statutes should not be construed in a way that renders them superfluous or meaningless, *In Re Briggs*, 143 B.R. 438, 444 (Bankr. E.D.Mich. 1992); and (iii) ignored the many decisions illustrating the Section 525(b) cause of action and ordering various remedies for its violations. *E.g., In Re Sweeney*, 113 B.R. 359 (Bankr. N.D. Ohio 1989) (back pay, raise, fringe benefits); *Bell v. Sanford-Corbitt-Bruker, Inc.*, 2 IER Cases 914 (S.D. Ga. 1987) (lost wages and emotional distress damages); *In Re Hopkins*, 81 B.R. 491 (Bankr. W.D.Ark. 1987) (reinstatement); *Matter of McNeely*, 82 B.R. 628 (Bankr. S.D.Ga. 1987) (lost profits).

On August 11, 1995, GSB moved for reconsideration of the Supreme Court of New Hampshire's decision.

Reconsideration was denied on September 14, 1995. App. 12a.

REASONS FOR ALLOWANCE OF THE WRIT

The Constitution reserves to Congress the power to establish uniform laws on the subject of bankruptcy. U.S.Const., Art.I, § 8, cl.4. Such uniformity precludes variations "depending on state law." *Perez v. Campbell*, 402 U.S. at 656. Congress exercises this power to establish uniform laws on the subject of bankruptcy (and automatically preempts all state law on the same subject) whenever it enacts bankruptcy legislation. *Sturges v. Crowninshield*, 4 Wheat. (17 U.S.) 122, 193 (1819). Congress exercised this power over the matter at hand when it enacted Section 525(b) into the Bankruptcy Code. *See, International Shoe Co. v. Pinkus*, 278 U.S. at 265. Congress intended Section 525(b) to uniformly further bankruptcy's limited "fresh start" policy, *Stellwagen v. Clum*, 245 U.S. 605, 617 (1918), to codify *Perez*, 402 U.S. 637, and to override *In Re Barbee*, 14 B.R. 733 (Bankr. E.D.Va. 1981). The plain meaning of Section 525(b) reveals that the only bankruptcy discrimination for which Congress was willing to provide a cause of action and a remedy is that which occurs "solely because" of a debtor/employee's bankruptcy status. 11 U.S.C. § 525(b); *Laracuente v. Chase Manhattan Bank*, 891 F.2d 17 (1st Cir. 1989); *Comeaux v. Brown & Williamson Tobacco Co.*, 915 F.2d 1264 (9th Cir. 1990); *Stockhouse v. Hines Motor Supply (Wyoming), Inc.*, 75 B.R. 83 (D. Wyo. 1987).

> The national purpose to establish uniformity necessarily excludes state regulation . . . States may not pass or enforce laws to interfere with or complement the Bankruptcy Act, or to provide additional or auxiliary regulations.

International Shoe Co. v. Pinkus, 278 U.S. at 265. Thus, the Supreme Court of New Hampshire's recognition of a common law cause of action for bankruptcy-related wrongful discharge violates the plain meaning of the words in the bankruptcy uniformity mandate of U.S.Const., Art.I, § 8, cl.4, as well as this Court's interpretation of same.

Furthermore, the Supreme Court of New Hampshire's decision (i) violates the express preemptive effect of the Bankruptcy Uniformity Clause, U.S.Const., Art.I. § 8, cl.4; (ii) intrudes into a "field" Congress broadly occupied when it enacted the Bankruptcy Code in 1978 and explicitly occupied when it enacted Section 525(b) in 1984 (pursuant to the Bankruptcy Uniformity and Supremacy Clauses); (iii) allows Wenners to attempt to proceed with a "mixed motive" common law cause of action in direct conflict with the "single motive" cause of action which Section 525(b) requires him to prove; (iv) allows Wenners potential damages that are in direct conflict with the limited and equitable remedies afforded by Section 105(a); (v) rewrites (thereby violating) the limited "safe harbor" and public policy against bankruptcy discrimination embodied in Section 525(b) in order to protect a debtor/employee whose Complaint, on its face, does not meet the "single motive" requirement of Section 525(b); and (vii) directly conflicts with the Ninth Circuit's holding in *Comeaux v. Brown & Williamson Tobacco Co.*, 915

F.2d 1264, that a debtor/employee who cannot satisfy the "solely because" requirement of Section 525(b) has *no* public policy claim for bankruptcy discrimination.

At least three decisions clearly indicate that unless the claim is a Section 525(b) claim, there is no claim. *Laracuente v. Chase Manhattan Bank*, 891 F.2d 17, held that the "solely because" standard of Section 525(b) meant, as a matter of Congressional intent and plain statutory meaning, that only alleged employment discrimination which occurred "solely because" of the debtor/employee's bankruptcy status was actionable. In *Pastore v. Medford Savings Bank*, 186 B.R. 553, 555 (D.Mass. 1995), the court declined to hear plaintiff's state law claim for intentional infliction of emotional distress after finding she had no Section 525(b) claim, suggesting that a Section 525(b) claim is an all-or-nothing remedy. In *Stockhouse v. Hines Motor Supply*, 75 B.R. 83, the plaintiff brought a Section 525(b) claim *and* a common law claim of wrongful discharge for alleged bankruptcy discrimination and then dropped the common law claim prior to adjudication. The Supreme Court of New Hampshire's decision is the first to allow a bankruptcy based common law wrongful discharge claim different from and *instead of* a Section 525(b) claim.

In fact, the Supreme Court of New Hampshire's decision is inconsistent with all known judicial precedent. Of the more than 20 cases facing the issue of bankruptcy discrimination under Section 525(b), Boshkoff, *Bankruptcy-Based Discrimination*, 66 Am.Bankr.L.J. 387, 388-389 n.10 (1992) (listing cases), none has allowed a plaintiff to maintain a common law cause of action for wrongful discharge for bankruptcy discrimination alongside or instead of a Section 525 claim.

This conflict in the development of the law provides yet another reason this petition should be granted. The Supreme Court of New Hampshire's decision has the potential to create jurisprudential havoc on multiple levels and in multiple arenas. The force and effect of the Bankruptcy Uniformity Clause, its express preemptive effect both on its own and under the Supremacy Clause, the Bankruptcy Code, Section 525(b) and the public policies that inhere in these national, uniform bankruptcy laws are all at risk. Such serious inroads require review by this Court to address these conflicts and to avert the danger of continued intrusion into and interference with these important constitutional issues. Granting GSB's petition will give the Court the opportunity to uphold the plain meaning and intent of both the uniform and supreme federal law of bankruptcy as well as the viability of this Court's own precedent.

I. The Supreme Court of New Hampshire's Decision Conflicts With the Precedent of This Court.

In *International Shoe Co. v. Pinkus,* the Court addressed when state action in areas that touch upon bankruptcy is excluded.

> In respect of bankruptcies the intention is plain. The national purpose to establish uniformity necessarily excludes state regulation. . . . Congress did not intend to give insolvent debtors . . . or their creditors . . . choice between the relief provided by the Bankruptcy Act and that specified in state insolvency laws. *States may not pass or enforce laws to interfere with or complement the Bankruptcy Act, or to provide additional or auxiliary regulations.*

Id., 278 U.S. at 265 (emphasis supplied); *Perez v. Campbell*, 402 U.S. 637.

It is clear that the cause of action recognized under New Hampshire common law is related to the subject of bankruptcies and was superseded by Congress via 11 U.S.C. § 525(b). This petition should be granted so that the Court can correct the Supreme Court of New Hampshire's refusal to adhere to the Constitution as well as the precedent of this Court on matters of federal constitutional law.

II. The Public Policy Aspect of the Supreme Court of New Hampshire's Decision Directly Conflicts with Ninth Circuit Precedent.

Wenners claimed there were two reasons for his allegedly wrongful employment termination:

> because plaintiff sought and obtained relief under the United States Bankruptcy Act . . . and [because] the plaintiff refused to transfer assets to the . . . defendant corporation in violation of the Bankruptcy Act.

App. 21a. Acknowledging that Wenners claimed *two* reasons for his allegedly wrongful discharge, App. 21a, the Supreme Court of New Hampshire allowed Wenners' common law claim for wrongful discharge in violation of the public policy against bankruptcy discrimination allegedly contained in Section 525(b) to proceed.[2] It held that:

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[2] At least 44 states have recognized common law causes of action for wrongful discharge (each with its own elements,

> The prohibition in section 525(b) and a State law cause of action for wrongful termination based on public policy set forth in that section are not incompatible; in fact, they are complementary.

App. 5a-6a. The Supreme Court of New Hampshire's decision in this regard directly conflicts with Ninth Circuit precedent.

In *Comeaux v. Brown & Williamson Tobacco Co.*, 915 F.2d 1264, the plaintiff alleged multiple causes of action, including violation of Section 525(b) and wrongful termination in violation of the public policy set forth in Section 525(b). Finding that Section 525(b) required Comeaux to "show that one of the reasons for discharge enumerated in section 525(b) provided the *sole* reason for termination," *id.* at 1269 (original emphasis), and that "knowledge of the bankruptcy was clearly *not* the sole factor influencing" the company's termination decision, *id.*, the Ninth Circuit affirmed summary judgment under Section 525(b) in favor of the company. Because Comeaux alleged no other public policy violation than that based on the company's purported violation of Section 525(b), and because Comeaux had not prevailed on his direct Section 525(b) claim, the Ninth Circuit granted summary judgment in the company's favor on Comeaux's public policy claim also. *Id.*

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defenses, remedies and nuances), and at least 28 of these states (including New Hampshire) have recognized a common law cause of action for wrongful discharge in violation of public policy. *See, e.g., Cummins v. EG&G Sealol, Inc.*, 690 F.Supp. 134, 137-138 (D.R.I. 1988) (listing and discussing cases).

Wenners' allegations are virtually identical to the public policy allegations in *Comeaux v. Brown & Williamson*. The Supreme Court of New Hampshire allowed Wenners' two-part public policy claim, founded on the public policy of Section 525(b), to proceed. App. 6a, 21a. Like the Ninth Circuit, the First Circuit recognizes Section 525(b) claims only where the alleged discrimination occurred "solely because" of a person's bankruptcy status. *Laracuente v. Chase Manhattan Bank*, 891 F.2d at 23. Thus, any direct Section 525(b) claim Wenners might have brought would have necessarily failed because he asserted *two* reasons for his allegedly wrongful termination. App. 21a. Accordingly, the Supreme Court of New Hampshire's decision directly conflicts with *Comeaux v. Brown & Williamson*. The Supreme Court of New Hampshire's attempt to rewrite federal bankruptcy policy should not be allowed, and this petition should be granted in order that the Court can address this conflict in the law.

III. The Supreme Court of New Hampshire's Decision Directly Conflicts With the Uniformity Mandate of the Bankruptcy Clause.

A. Uniformity Is An Important Federal Question Meriting the Court's Review.

The Supreme Court of New Hampshire ignored GSB's bankruptcy uniformity argument, dismissing it out-of-hand as "unpersuasive." App. 6a. It is important that the Court review the Supreme Court of New Hampshire's decision because, as it presently stands, that decision violates the plain, literal meaning of the Bankruptcy

Uniformity Clause, U.S.Const., Art.I, § 8, cl.4. Even though Congress has legislated on the "subject" of bankruptcy employment discrimination, New Hampshire has seen fit to create an entirely separate and different claim on the same subject matter. If this decision stands, there is also a danger of future incompatible adjucations from other jurisdictions. This will further diminish and nullify the bankruptcy uniformity mandate. The Supreme Court of New Hampshire's decision opens the door for other states to rewrite or ignore bankruptcy uniformity. To avert such impermissible interference with uniformity, the Court should review and reverse the lower court's decision.

As originally contemplated, the Bankruptcy Uniformity Clause granted Congress "unrestricted and paramount" plenary and exclusive powers over bankruptcy matters. *International Shoe v. Pinkus*, 278 U.S. at 265; *New Lamp Chimney Co. v. Ansonia Brass & Copper Co.*, 1 Otto. (91 U.S.) 656, 661 (1876). Once Congress has legislated on a particular bankruptcy issue, state laws on the same subject are *de jure* rendered incompatible. *Sturges v. Crowninshield*, 4 Wheat. (17 U.S.) at 193. While Congress may take state law differences into account when it enacts bankruptcy legislation, *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 159 (1974), and may allow uniform bankruptcy legislation to produce different results in different states, *Railway Labor Executives' Association v. Gibbons*, 455 U.S. at 469, the states are not free to set federal bankruptcy policy. Moreover, when Congress intends non-bankruptcy law to apply, it knows how to, and does, so state. *Compare, 11 U.S.C. § 525, with, 11 U.S.C. §§ 101(52), 108, 363(f)(1), 365(c)(3), 365(h)(1), 365(n), 510,*

522(b)(2)(B), 522(d), 524(c), 524(d)(1)(A), 541(c)(2), 552(b), 943, 1123(a)(5), 1126.

Furthermore, in maintaining uniformity and superseding state law attempts to enter the field, the Court has held that:

> [i]n respect of bankruptcies the intention of Congress is plain. The national purpose to establish uniformity necessarily excludes state regulation. It is apparent, without comparison in detail of the provisions of the Bankruptcy Act with those of the Arkansas statute, that intolerable inconsistencies and confusion would result if that insolvency law be given effect while the national Act is in force. *Congress did not intend to give* insolvent debtors seeking discharge, or their creditors seeking to collect claims, *choice between the relief provided by the Bankruptcy Act and that specified in state insolvency laws. States may not pass or enforce laws to interfere with or complement the Bankruptcy Act, or to provide additional or auxiliary regulations.*

International Shoe v. Pinkus, 278 U.S. at 265 (emphasis supplied). *Pinkus* is still good law and upholds the plain meaning of Article I, Section 8, Clause 4.

Thus, the Supreme Court of New Hampshire's decision patently violates the bankruptcy uniformity mandate of the Constitution in an area of bankruptcy law where Congress has legislated and has not acknowledged that any state variation is permissible. Moreover, Section 525(b)'s legislative history indicates a Congressional intent to keep Section 525(b) claims uniform throughout the country.

B. The Legislative History of Section 525 Informs the Uniformity Inquiry.

Perez v. Campbell, 402 U.S. 637, held that an Arizona highway safety statute which deprived a bankrupt debtor of his driver's license, was impliedly preempted through frustration of the Bankruptcy Act's purpose to afford debtors a *full* discharge from their debts and a "fresh start" in life. *Id.* at 648. The *Perez* holding preceded congressional legislation and policy setting on the subject of bankruptcy discrimination. After, and largely because of *Perez*, Congress considered adding a bankruptcy discrimination provision to the already comprehensive Bankruptcy Act. As originally proposed, it provided:

> A person shall not be subjected to discriminatory treatment because he, or any person with whom he is or has been associated, is or has been a debtor or has failed to pay a debt discharged in a case under the Act. This action does not preclude consideration, where relevant, of factors other than those specified in the preceding sentence such as present and prospective financial condition or managerial ability.

Report of the Commission on the Bankruptcy Laws of the United States, H.Doc.No.137, 93d Cong., 1st Sess., Pt.2 at 143-144 (1973). Subsequent hearings revealed that the proposed language was too broad. Hrgs. on S.234 and S.236 Before Sen. Subcomm. on Improvements in Judicial Machinery, 94th Cong., 1st Sess., Pt.1 at 129, 146, 173 (1975); *id.*, Pt.2 at 433, 479, 486. In so concluding, Congress established from the outset its legislative control, through the Bankruptcy Uniformity Clause, over what eventually became Sections 525(a) and (b). Congress'

rejection of the original broad-based proposal was a policy decision that employment discrimination was to be protected *only* to the extent set forth in Section 525. As one court has said, in 1973 Congress considered:

> the extension of the anti-discrimination section to private entities and rejected same as being overbroad. . . . it is an axiom of statutory construction "that respect should be paid to the limits to which Congress was prepared to go to enact a particular policy, especially when the boundaries of a statute were drawn in compromise from countervailing pressures of other policies." . . . For this Court to enjoin a private entity based upon s. 525 would be judicial legislation in an area which Congress has specifically considered and defined.

In Re Barbee, 14 B.R. at 735 n.3 (citation omitted).

When Congress enacted Section 525(a) in the Bankruptcy Reform Act of 1978, Pub.L.No.95-598, 92 Stat. 2593, it codified *Perez v. Campbell*, 402 U.S. 637, and prohibited only governmental units from engaging in certain forms of bankruptcy discrimination. S.Rep.No.989, 95th Cong., 2d Sess. 81 (1978), *reprinted in*, 5 U.S. Code Cong. & Admin. News 5787, 5867 (1978) ("S.Rep."); H.Rep.No.595, 95th Cong., 1st Sess. 366-367 (1977), *reprinted in*, 5 U.S. Code Cong. & Admin. News 5963, 6323 (1978) ("H.Rep.").

> The prohibition extends *only* to discrimination or other action *based solely* on the basis of the bankruptcy, on the basis of insolvency before or during bankruptcy prior to a determination of discharge, or on the basis of nonpayment of a

> debt discharged in the bankruptcy case (the *Perez* situation).

S.Rep. at 81 (emphasis supplied); H.Rep. at 366-367 (emphasis supplied); *accord, In Re Exquisito Services, Inc.*, 823 F.2d 151, 153-154 (5th Cir. 1987). Congress noted that Section 525(a), as enacted, was not so broad as proposed Section 4-508, and directed the judiciary to "continue to mark the contours of the anti-discrimination provision *in pursuit of sound bankruptcy policy.*" S.Rep. at 81 (emphasis supplied); H.Rep. at 367 (emphasis supplied). Finally, and significantly, Congress stated that Section 525(a)'s prohibition against bankruptcy discrimination was effective "[n]otwithstanding any other laws." S.Rep. at 81; H.Rep. at 366. The use of the word "notwithstanding" indicated a legislative intent to abrogate *all* law on the subject of bankruptcy discrimination by governmental entities (*other than* Section 525(a)).

In 1983, Congress considered, but did not enact, an amendment to Section 525 which would have extended:

> the protection against discrimination to persons employed in the private sector. Under this section, no private employer may terminate employment of or discriminate with respect to employment against any person on the basis that that person had been or will be a debtor in bankruptcy, or has suffered insolvency pending a discharge.

S.Rep.No.65, 98th Cong., 1st Sess. 89 (1983), *accompanying*, S.445, Omnibus Bankruptcy Improvements Act of 1983. Then, as part of the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub.L.No. 98-353, 98 Stat. 333 (1984), Congress enacted Section 525(b). Section 525(b)

rejected, like Section 525(a) before it, the broad language of the 1973 proposal. *Lorillard v. Pons*, 434 U.S. 575, 581 (1978). Also, like Section 525(a) before it, Section 525(b) must be presumed to express a congressional intent to abrogate *all* law on the subject of bankruptcy discrimination by private employers *other* than Section 525(b). *Cannon v. University of Chicago*, 441 U.S. 677, 696-697 (1979) (Congress is presumed to be familiar with state of law at time it enacts or amends statute).

Since its enactment in 1984, Section 525(b) has been interpreted and applied as a limited "safe harbor" for debtor/employees, affording relief only to those who can demonstrate they were discriminated against "solely because" of their bankruptcy status. *E.g., Laracuente v. Chase Manhattan Bank*, 891 F.2d 17; *Comeaux v. Brown & Williamson*, 915 F.2d 1264; *In Re Sweeney*, 113 B.R. at 363; *Stockhouse v. Hines Motor Supply*, 75 B.R. at 85; *In Re Hicks*, 65 B.R. 980 (Bankr. W.D.Ark. 1986); *but see, Bell v. Sanford-Corbitt-Bruker*, 2 IER Cases 914; *In Re Metro Transportation*, 64 B.R. 968 (Bankr. E.D.Pa. 1986).

The legislative history preceding Congress' enactment of Section 525(b) raises important federal questions in the face of the Supreme Court of New Hampshire's action. Section 525's legislative history clearly indicates Congress intended bankruptcy discrimination to be remedied only if it occurred "solely because" of a debtor/employee's bankruptcy status. The Supreme Court of New Hampshire's decision takes no account of these matters and so takes no account of the Constitution's bankruptcy uniformity mandate, reducing that mandate to a nullity. To leave the states free to regulate conduct so plainly at odds with the central uniformity aim of Section

525(b) and of the Bankruptcy Code has created a conflict between Congress' exercise of its constitutional power and state law requirements which this Court should address. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244 (1959).

IV. The Supreme Court of New Hampshire Misstated and Misapplied Express Preemption Law and So Raised Important Federal Questions.

That the Supreme Court of New Hampshire failed to find Wenners' common law wrongful discharge claim expressly preempted raises an important question of federal law. The Constitution is the supreme law of the land. U.S.Const., Art.VI, cl.2. The New Hampshire Court went awry, *inter alia*, because preemption analysis in the bankruptcy context differs from that in the more usual context of federal intrusion into traditional areas of state police power. *Compare, Perez v. Campbell*, 402 U.S. 637, *and, International Shoe Co. v. Pinkus*, 278 U.S. 261, *with, English v. General Electric Co.*, 496 U.S. 72 (1990). The Bankruptcy Uniformity Clause, in conjunction with the Supremacy Clause, work an automatic preemption whenever Congress exercises its bankruptcy power. *Sturges v. Crowninshield*, 17 U.S. at 193 (when Congress enacts bankruptcy legislation, "[t]he subject is as completely taken from the State Legislatures, *as if they had been expressly forbidden to act on it*") (emphasis supplied); *Perez v. Campbell*, 402 U.S. at 656; *accord, Kalb v. Feuerstein*, 308 U.S. 433, 439 (1940) (when Congress enacted Bankruptcy Act, it became supreme law of land which all courts, federal *and state*, must observe); *Local Loan Co. v. Hunt*, 292 U.S. 234 (1934) (supremacy of bankruptcy law upheld against

state common law lien enforcement); *International Shoe Co. v. Pinkus*, 278 U.S. at 265-266 ("It is clear that the provisions of the Arkansas law governing the distribution of property of insolvents for the payment of their debts and providing for their discharge, or that otherwise relate to the subject of bankruptcies, are within the field entered by Congress when it passed the Bankruptcy Act, and therefore such provisions must be held to have been superseded.").

The absence of an express preemption in the Bankruptcy Code itself is of no moment. It is Congress' enactment of bankruptcy law, without more, which expressly preempts state law on the same subject.

> *The purpose to exclude state action* for the discharge of insolvent debtors *may be manifested without specific declaration to that end;* that which is clearly implied is of equal force as that which is expressed. . . . *In respect of bankruptcies the intention of Congress is plain. The national purpose to establish the uniformity necessarily excludes state regulation.*

International Shoe v. Pinkus, 278 U.S. at 265 (citations omitted) (emphasis supplied). Therefore, by the enactment of Section 525(b), Congress expressly preempted all relief from bankruptcy discrimination except that arising "solely because" of a debtor/employee's bankruptcy status, 11 U.S.C. § 525(b), and New Hampshire's common law wrongful discharge as related to bankruptcy was expressly preempted out of the area of bankruptcy discrimination law at that time.

The Supreme Court of New Hampshire completely ignored the foregoing express preemption analysis in the

bankruptcy context. Instead, the court looked to the Bankruptcy Code, found no express preemption provision therein, and blindly concluded that no express preemption existed. App. 4a. The court utterly failed to appreciate that this case is not a Commerce Clause case and that bankruptcy law is a separate body of jurisprudence from that developed in furtherance of Congress' Commerce Clause powers.

The court also ignored that bankruptcy legislation is a "unique federal interest" and that immigration and naturalization is an area of law more comparable to bankruptcy than Commerce Clause regulation. *Boyle v. United Technologies Corp.*, 487 U.S. at 504; *In Re Public Service Company of New Hampshire*, 108 B.R. 854, 881 (Bankr. D.N.H. 1989); *Hines v. Davidowitz*, 312 U.S. 52, 62-63 (1941); *Kahn v. INS*, 36 F.3d 1412, 1412 (9th Cir. 1994).

Finally, the Supreme Court of New Hampshire completely ignored this Court's holding in *Perez v. Campbell*, 402 U.S. 637; that Congress enacted Sections 525(a) and (b) *after Perez*; Section 525's legislative history; and a considerable body of lower court decisions interpreting and applying Section 525(b). Boshkoff, *Bankruptcy-Based Discrimination*, 66 Am. Bankr. L.J. at 388-389 n.10 (listing cases). In *Perez*, the Court made clear that the only constitutional law covering bankruptcy is the law contained in the Bankruptcy Code, thus preserving uniformity and preventing state law from altering the effect of bankruptcy, "a result explicitly prohibited by the uniformity requirement in the constitutional authorization to Congress to enact bankruptcy legislation." *Perez v. Campbell*,

402 U.S. at 656. The Court should extend the *Perez* holding to rule that, since Congress *has* now enacted, prescribed and *limited* bankruptcy discrimination legislation, all state law on the same subject is expressly preempted by virtue of Congress' enactment of federal bankruptcy discrimination legislation pursuant to its bankruptcy power. *See also, International Shoe Co. v. Pinkus,* 278 U.S. 261.

V. The Supreme Court of New Hampshire Misstated and Misapplied Implied Preemption Law in Ways That Merit the Court's Review.

The Supreme Court of New Hampshire misstated and misapplied implied preemption law. As with its approach to express preemption, the state court failed to recognize the fundamental distinction between ordinary implied preemption analysis, *e.g., English v. General Electric,* 496 U.S. 72, and implied preemption analysis in the bankruptcy context. *Perez v. Campbell,* 402 U.S. 637. In fact, although GSB raised the issue, the state court did not even acknowledge the existence of *Perez.*

Instead, the Supreme Court of New Hampshire held that it found no "clear and manifest" intent to preempt common law claims for wrongful discharge. App. 5a. The court completely avoided Congress' "clear and manifest" intent to preempt all state law touching and concerning bankruptcy discrimination when it enacted Section 525, thereby occupying the "field" of bankruptcy discrimination. 11 U.S.C. § 525(b); S.Rep. at 81; H.Rep. at 367; *accord, Pobreslo v. Joseph M. Boyd Co.,* 287 U.S. 518, 526 (1933) (state law proceeding which derives its force solely from

federal bankruptcy legislation is within "field" of Bankruptcy Act). The state court ignored the clear Congressional directive in Section 525's legislative history that the judiciary *"mark the contours"* of Section 525 *"in pursuit of sound bankruptcy policy,"* S.Rep. at 81 (emphasis supplied); H.Rep. at 367 (emphasis supplied), "sound bankruptcy policy" being the limited "fresh start" policy of *Perez v. Campbell*, 402 U.S. at 648.

Moreover, the state court's recognition of Wenners' common law wrongful discharge claim frustrates and directly conflicts with Section 525(b)'s purpose of relieving only those persons who establish they were discharged "solely because" of their bankruptcy status. 11 U.S.C. § 525(b); *Laracuente v. Chase Manhattan Bank*, 891 F.2d 17. Under New Hampshire common law, Wenners' wrongful discharge claim succeeds once he shows GSB was motivated by bad faith, malice or retaliation and that Wenners acted in ways that public policy encourages or refused to act in ways that public policy condemns. *Short v. School Admin. Unit 16*, 136 N.H. 76, 612 A.2d 364, 370 (1992). On its face, Wenners' Complaint attempts to satisfy these two elements of New Hampshire's common law claim by drawing upon the Bankruptcy Code. Under Section 525(b), Wenners' Complaint would not state a cause of action because Section 525(b) requires that the *sole* reason for alleged bankruptcy discrimination be the plaintiff's bankruptcy status. 11 U.S.C. § 525(b); *Laracuente v. Chase Manhattan Bank*, 891 F.2d at 23.[3] The

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[3] The few courts that have interpreted the "solely because" requirement more broadly have done so on the grounds that Section 525(b) imposes an impossible burden of proof and so

Supreme Court of New Hampshire should have held Wenners' common law wrongful discharge claim impliedly preempted by Section 525(b) for directly conflicting with an essential element of Section 525(b) – that the alleged bankruptcy discrimination be "solely because" of the debtor/employee's bankruptcy status.

Finally, the court mistakenly held Wenners' common law claim for wrongful discharge was not preempted by the limited equitable relief available under Section 105(a) for Section 525(b) violations because state common law remedies for wrongful discharge would merely supplement, not supplant, federal law. App. 5a-6a. The court's conclusion that Section 105(a) remedies may be supplemented with state common law remedies directly conflicts with Congress' specific intent to afford debtor/employees only a *limited* "safe harbor" under Section 525(b) with only the limited equitable relief of Section 105(a). *International Shoe v. Pinkus*, 278 U.S. at 265 (states may not pass or enforce laws that interfere with *or complement* bankruptcy legislation and may not provide additional or auxiliary regulation); *Gonzales v. Parks*, 830 F.2d 1033, 1036 (9th Cir. 1987) (Congress' authorization of

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should not be literally interpreted. *See, e.g., Bell v. Sanford-Corbitt-Bruker*, 2 IER Cases at 916 ("but for" rather than "solely because"); *In Re Metro Transportation*, 64 B.R. 968 (broadly construing "solely" in Section 525(a) as meaning "played a significant role"). This concern is belied by the numerous courts that have found and remedied bankruptcy discrimination that occurred "solely because" of a debtor/employee's bankruptcy status. *E.g., In Re Patterson*, 967 F.2d 505, 514 (11th Cir. 1992); *Laracuente*, 891 F.2d at 23; *In Re Sweeney*, 113 B.R. 359; *Bell v. Sanford-Corbitt-Bruker*, 2 IER Cases 914; *In Re Hopkins*, 81 B.R. 491; *Matter of McNeely*, 82 B.R. 628.

certain sanctions in Bankruptcy Code "should be read as an implicit rejection of other penalties, including the kind of substantial damage awards that might be available in state tort suits"); *Middlesex County Sewerage Authority v. Sea Clammers*, 453 U.S. 1, 14-15 (1981) (Congress should be presumed to have provided and intended only precise remedies it considers appropriate).

Clearly, the Supreme Court of New Hampshire's recognition of a common law cause of action for wrongful discharge frustrates the remedial scheme of Sections 525(b) and 105(a) to provide debtor/employees with a limited "safe harbor" and limited relief. Such recognition alters the balance of incentives and disincentives created by Congress to protect debtors, but not to reward them. Thus, the state court's decision raises important federal questions concerning the economic impact of state law claims for wrongful discharge on the uniform law of bankruptcy and its limited "safe harbor" for debtor/employees.

CONCLUSION

Petitioner Great State Beverages, Inc. respectfully requests that the Court grant its Petition for a Writ of *Certiorari* and decide whether the Supreme Court of New Hampshire's allowance of a common law cause of action for wrongful discharge due to alleged bankruptcy discrimination violates the Bankruptcy Uniformity and/or the Supremacy Clauses of the U.S. Constitution as well as the precedent of the Court and to resolve the conflict

which now exists between this case and *Comeaux v. Brown & Williamson Tobacco Co.*, 915 F.2d 1264 (9th Cir. 1990).

Respectfuly submitted,

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January 16, 1996

NOTICE: This opinion is subject to motions for rehearing under Rule 22 as well as formal revision before publication in the New Hampshire Reports. Readers are requested to notify the Clerk/Reporter, Supreme Court of New Hampshire, Supreme Court Building, Concord, New Hampshire 03301, of any errors in order that corrections may be made before the opinion goes to press.

THE SUPREME COURT OF NEW HAMPSHIRE

Hillsborough-northern judicial district
No. 94-028

DAVID WENNERS

v.

GREAT STATE BEVERAGES, INC.

August 4, 1995

Kelliher & Clougherty and *Elizabeth Cazden*, of Manchester (*Michael B. Clougherty* and *Ms. Cazden* on the brief, and *Mr. Clougherty* orally), for the plaintiff.

Nixon, Raiche, Brown & Manning, of Manchester, and *Herbert H. Bennett & Associates, P.A.*, of Portland, Maine (*David L. Nixon* and *Peter Bennett* on the brief, and *Mr. Bennett* orally), for the defendant.

HORTON, J. This interlocutory appeal comes to us following an order of the Superior Court (*Conboy*, J.) denying the defendant's motion to dismiss the wrongful termination claims of the plaintiff, David Wenners. On appeal, the defendant, Great State Beverages, Inc. (Great

State), argues that the plaintiff's wrongful termination claims are not recognized under New Hampshire law because a valid statutory remedy exists, are preempted under the supremacy clause of the United States Constitution, and would thwart the uniformity mandated by the bankruptcy clause of the United States Constitution and section 525(b) of the Bankruptcy Code. We affirm and remand.

Because this appeal comes to us on a denial of a motion to dismiss for either failure to state a claim upon which relief may be granted or preemption of that claim, we assume the truth of the facts as alleged in the plaintiff's pleadings and construe all reasonable inferences in the light most favorable to the plaintiff. *Thompson v. Forest*, 136 N.H. 215, 216, 614 A.2d 1064, 1065 (1992). We will affirm the trial court's order denying the motion to dismiss if "the allegations in the plaintiff's pleadings are reasonably susceptible of a construction that would permit recovery." *Id.* (brackets and quotation omitted).

The plaintiff worked for Great State for nineteen years, during the later part of which he filed a petition for voluntary personal bankruptcy. The chief executive officer of Great State and/or his son, the president of Great State, asked the plaintiff to turn over assets to either or both of them in contravention of a bankruptcy court order, which the plaintiff refused to do. Great State terminated the plaintiff's employment, and he brought suit alleging that his termination was a result of his bankruptcy filing and/or his refusal to comply with the demands to turn over the assets.

The defendant, citing *Howard v. Dorr Woolen Company*, 120 N.H. 295, 297, 414 A.2d 1273, 1274 (1980), argues that where a statutory remedy exists, no common law cause of action can lie. The defendant contends that the plaintiff has a valid statutory remedy under the United States Bankruptcy Code. *See* 11 U.S.C. §§ 105(a), 525(b) (1988). Section 525(b) bars private employers from terminating or discriminating with respect to the employment of a debtor or bankrupt under the act solely because such debtor or bankrupt has filed for bankruptcy, failed to pay a debt that is dischargeable, or been discharged under the act. 11 U.S.C. § 525(b). Section 105(a) permits the bankruptcy court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]." 11 U.S.C. § 105(a).

In order to have a valid claim for wrongful termination, the plaintiff must show: "one, that the employer terminated the employment out of bad faith, malice, or retaliation; and two, that the employer terminated the employment because the employee performed acts which public policy would encourage or because he refused to perform acts which public policy would condemn." *Short v. School Admin. Unit 16*, 136 N.H. 76, 84, 612 A.2d 364, 370 (1992). While a plaintiff may not pursue a common law remedy where the legislature intended to replace it with a statutory cause of action, *see Howard*, 120 N.H. at 297, 414 A.2d at 1274; *Thompson*, 136 N.H. at 216, 614 A.2d at 1065, here, there has been no clear statutory intent to supplant the common law cause of action. *Compare Howard*, 120 N.H. at 297, 414 A.2d at 1274 (proper remedy for age discrimination provided by statute, which specifically prohibits age discrimination and details procedure for

pursuing such action) *with* 11 U.S.C. § 525(b). "Section 525(b) itself provides no remedy for violation by a private employer," *In re Hicks*, 65 B.R. 980, 984 (Bankr. W.D. Ark. 1986), nor does it set forth procedures or refer to any other section of the Code. While section 525(b) generally prohibits termination of employment, it does not evidence an intent to supplant a common law cause of action for wrongful termination.

The defendant next argues that because the plaintiff relies on the Bankruptcy Code to support the public policy prong of his wrongful termination claim, it is preempted by federal bankruptcy law. We disagree.

The United States Supreme Court has defined three circumstances in which state law is preempted under the supremacy clause. "First, Congress can define explicitly the extent to which its enactments pre-empt state law." *English v. General Electric Co.*, 496 U.S. 72, 78 (1990). "Second, in the absence of explicit statutory language, state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively." *Id.* at 79. "Finally, state law is pre-empted to the extent that it actually conflicts with federal law." *Id.*

Our review of the Bankruptcy Code reveals nothing that triggers an express preemption of state common law claims for wrongful termination based on section 525(b). *See English*, 496 U.S. at 80. Therefore, we proceed to the other possible grounds for preemption. Under the second circumstance of preemption, an intent to occupy the field exclusively

> may be inferred from a scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room for States to supplement it, or where an Act of Congress touches a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.

Id. at 79 (quotations, ellipses, and brackets omitted). If the field which Congress is said to have preempted includes an area traditionally occupied by the States, such as employment or employment discrimination, *see Jones Dairy Farm v. N.L.R.B.*, 909 F.2d 1021, 1027 (7th Cir. 1990), Congress' intent to preempt must be "clear and manifest." *English*, 496 U.S. at 79 (quotation omitted). While the Bankruptcy Code is quite extensive and pervasive, its treatment of wrongful termination claims is not. Section 525(b), although dealing with the issue of bankruptcy and employment, provides no set of procedures or explicit means to enforce claims for wrongful termination. We find no "clear and manifest" intent to preempt a claim of wrongful termination under state law.

Nor is a cause of action for wrongful termination under State law in actual conflict with federal law. An actual conflict exists when "it is impossible for a private party to comply with both state and federal requirements or where state law stands as an obstacle to the accomplishments and execution of the full purpose and objective of Congress." *English*, 496 U.S. at 79 (quotation and citation omitted). The prohibition in section 525(b) and a State law cause of action for wrongful termination based on the public policy set forth in that section are not

incompatible; in fact, they are complementary. A wrongful termination claim relying on section 525(b) would further the goals of Congress to protect debtors from discrimination and ensure that all property that belongs in the estate remain in or be returned to the estate. *See* 11 U.S.C. §§ 525(b), 542 (1988). That a cause of action under State common law may offer the plaintiff a greater remedy then does the Bankruptcy Code does not affect our analysis. *English*, 496 U.S. at 89 ("[O]rdinarily, state causes of action are not pre-empted solely because they impose liability over and above that authorized by federal law." (quotation omitted)).

We have considered the defendant's remaining argument and find it unpersuasive. *See Vogel v. Vogel*, 137 N.H. 321, 322, 627 A.2d 595, 596 (1993). We affirm the superior court's denial of the defendant's motion to dismiss.

Affirmed and remanded.

All concurred.

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS. SUPERIOR COURT
Northern District

David A. Wenners

v.

Great State Beverage, Inc.

93-C-326

ORDER ON MOTION TO DISMISS

The plaintiff alleges that the defendant wrongfully terminated his employment because he sought and obtained relief under the United States Bankruptcy Code, and because he refused, upon repeated requests, to transfer assets to the Chief Executive Officer and/or President of the defendant corporation in violation of the Bankruptcy Code. The plaintiff also claims that in addition to acting in bad faith, the defendant's conduct was egregious and outrageous.

The defendant moved to dismiss the plaintiff's complaint for failure to state a claim upon which relief may be granted. The defendant argues that the plaintiff's claims are (1) not recognized under New Hampshire common law, and (2) preempted by both the Bankruptcy and Supremacy Clauses of the United States Constitution.

Under New Hampshire law, in determining whether to grant a motion to dismiss for failure to state a claim upon which relief can be granted, the Court decides "...whether the allegations are reasonably susceptible of a construction that would permit recovery." *Collectramatic Inc. v. Kentucky Fried Chicken Corp.*, 127 N.H. 318, 320 ((1985) (quoting *Royer Foundry & Mach. Co. v. N.H. Grey*

Iron, Inc., 118 N.H. 649, 651 (1978)). In making this determination, the Court assumes all of the plaintiff's factual allegations to be true and construes both the factual allegations and the reasonable inferences therefrom in the light most favorable to the plaintiff. *Id.*

New Hampshire recognizes a common law claim for wrongful discharge, which is a termination "motivated by bad faith, malice or retaliation." *Howard v. Dorr Woolen Co.*, 120 N.H. 295, 297 (1980). The plaintiff must meet a two-part test to establish a wrongful discharge cause of action. First, the plaintiff "must show that the defendant was motivated by bad faith, malice, or retaliation in terminating the plaintiff's employment." *Cloutier v. the Great Atlantic & Pacific Tea Co., Inc.*, 121 N.H. 915, 921 (1981). Second, the plaintiff must demonstate [sic] "that he was discharged because he performed an act that public policy would encourage, or refused to do something that public policy would condemn." *Id.* at 922. Public policy consideration may be based on statutory or non-statutory grounds. *Cilley v. New Hampshire Ball Bearings, Inc.*, 128 N.H. 401 (1986).

In the instant case, taking as true the plaintiff's allegations that the defendant terminated his employment because he sought relief under the Bankruptcy Code and refused to unlawfully transfer assets, a jury could find that plaintiff's discharge was motivated by bad faith, malice or retaliation. And the plaintiff satisfies the second part of the wrongful discharge test as well: A jury could find that there exists public policy "encouraging" persons to seek relief under the Bankruptcy Code and "condemning" the subject requested asset transfer.

The defendant insists that the plaintiff's cause of action arises exclusively under the federal Bankruptcy Code, 11 U.S.C. §525(b), and in order to obtain relief in this case, the plaintiff must replead his claims under that statute. *See* Defendant's Motion to Dismiss and Incorporated Memorandum of Authorities at 1. The defendant argues that to allow the plaintiff's claim would undermine the constitutionally mandated uniformity of the bankruptcy laws. *See* U.S. Const., Art. I, Sec. 8. In addition, the defendant asserts that the Supremacy Clause of the U.S. Constitution makes federal bankruptcy law the supreme law of the land. *See* U.S. Const., Art. VI, cl. 2.

The Court first considers the defendant's argument that recognition of the plaintiff's claim under New Hampshire law would compromise the uniformity of the bankruptcy laws. The uniformity requirement does not prohibit the recognition of state laws which "do not treat commercial transactions in a uniform manner." *Railway Labor Executives Ass'n. v. Gibbons,* 102 S. Ct. 1169, 1176 (1982). This is so even if such recognition leads to different results in different states. *Id.* Nor does the uniformity requirement compel states to eliminate any differences "in their law governing commercial transactions." *Id.* Thus, the recognition of a state common law wrongful discharge claim, which on its surface does not touch upon bankruptcy law, is not necessarily an impediment to the Bankruptcy Clause's uniformity requirement.

Next, the Court considers the defendant's preemption argument under the Supremacy Clause. State law will be preempted if its effect is to frustrate Congressional intent. *Perez v. Campbell,* 91 S. Ct. 1704, 1713 (1971).

The test is whether it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Sharon Steel Corp. v. Whaland*, 121 N.H. 607, 614 (1981) (quoting *Florida Avocado Growers v. Paul*, 373 U.S. 132, 141 (1963)), vacated on other grounds 102 S. Ct. 3474 (1982). The U.S. Supreme Court has stated that in bankruptcy cases, Congressional control of non-conflicting state law causes of action "plainly must be deemed at a minimum." *Northern Pipeline Construction co. v. Marathon Pipeline Co.*, 102 S. Ct. 2858, 2878 (1982).

The Congressional purpose of 11 U.S.C. §525(b) was to prevent a private employer from taking discriminatory action "against an employee solely because the employee resorted to seeking relief under the bankruptcy laws." Norman McGuill [sic], Note, "The Prohibition on Discrimination Towards Bankrupt Employees: Congress Extends the Prohibition into the Private Sector by the Adoption of 11 U.S.C. §525(b)," *3 Bankruptcy Dev. J.* 641, 641 (1986). The act reflects the Bankruptcy Code's central purpose in providing debtors with "a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt." *Local Loan Co. v. Hunt*, 54 S. Ct. 695, 699 (1934).

A common law wrongful discharge complaint does not contravene the purposes of 11 U.S.C. §525(b). The rationale underlying the wrongful discharge claim is that "there is an implied covenant in every contractual relationship that the parties will carry out their obligations in good faith." *Cloutier*, 121 N.H. at 920. Nor would recognition of a claim in this area create a conflict. Assuming, arguendo, that the plaintiff's termination was in fact because he sought relief under the Code and/or refused

to unlawfully transfer assets, then the common law wrongful discharge claim would merely supplement, rather than frustrate, the remedy provided under the federal statute.

The Court finds the plaintiff has stated an actionable cause of action for wrongful discharge which is not pre-empted by federal law. Accordingly, the defendant's motion to dismiss is DENIED.

So ordered.

Sept 22, 1993
September 22, 1993

/s/ Carol Ann Conboy
Carol Ann Conboy,
Presiding Justice

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 94-028, *David Wenners v. Great State Beverages, Inc.*, the court upon September 14, 1995, made the following order:

Motion for reconsideration is denied.

Distribution:
Peter Bennett, Esquire
David Nixon, Esquire
Michael B. Clougherty, Esquire
Elizabeth Cazden, Esquire
Theresa Hayes, Supreme Court
Hillsborough County North Superior Court #C-93-326
Hon. Carol Ann Conboy
File

Howard J. Zibel,
Clerk

THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT
NORTHERN DISTRICT OF HILLSBOROUGH COUNTY

John M. Safford, Clerk
300 Chestnut Street
Manchester, N.H. 03101-2490
(603) 669-7410

November 8, 1993

NOTICE OF DECISION

No: C-93-326

David Wenners V Great State Beverages Inc.

You are hereby notified that on November 3, 1993 the following order was entered in the above matter:

RE: MOTION FOR RECONSIDERATION:

Denied, see order attached (Conboy,J)

JMS/lmr

Copy to: PETER BENNETT ESQ
PO BOX 7799
PORTLAND ME 04112-7799

MICHAEL CLOUGHERTY ESQ
KELLIHER & CLOUGHERTY
70 MARKET STREET
MANCHESTER NH 03101

THE STATE OF NEW HAMPSHIRE

93-C-326
Docket No.

ORDER ON DOCUMENT NO. ___

Upon consideration of defendant's Motion for Reconsideration of the Court's Order on the Motion to Dismiss, and the plaintiff's objection thereto, the Court denies the relief requested by the defendant.

Nov. 3, 1993
Date

/s/ Carol Ann Conboy
Signature
Presiding Justice

AOC•602•245 ORDER

THE CONGRESS Art. 1

Section 8, Clause 1. Powers of Congress; Levy of Taxes for Common Defense and General Welfare; Uniformity of Taxation

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States; . . .

Section 8, Clause 4. Naturalization and Bankruptcy

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States; . . .

* * *

Art. 6 SUPREME LAW OF LAND

Clause 2. Supreme Law of Land

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

BANKRUPTCY Ch. 1 11 § 105

§ 105. Power of court

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

(b) Notwithstanding subsection (a) of this section, a court may not appoint a receiver in a case under this title.

(c) The ability of any district judge or other officer or employee of a district court to exercise any of the authority or responsibilities conferred upon the court under this title shall be determined by reference to the provisions relating to such judge, officer, or employee set forth in title 28. This subsection shall not be interpreted to exclude bankruptcy judges and other officers or employees appointed pursuant to chapter 6 of title 28 from its operation.

(d) The court, on its own motion or on the request of a party in interest, may –

(1) hold a status conference regarding any case or proceeding under this title after notice to the parties in interest; and

(2) unless inconsistent with another provision of this title or with applicable Federal Rules of Bankruptcy Procedure, issue an order at any such conference prescribing such limitations and conditions as

the court deems appropriate to ensure that the case is handled expeditiously and economically, including an order that –

(A) sets the date by which the trustee must assume or reject an executory contract or unexpired lease; or

(B) in a case under chapter 11 of this title –

(i) sets a date by which the debtor, or trustee if one has been appointed, shall file a disclosure statement and plan;

(ii) sets a date by which the debtor, or trustee if one has been appointed, shall solicit acceptances of a plan;

(iii) sets the date by which a party in interest other than a debtor may file a plan;

(iv) sets a date by which a proponent of a plan, other than the debtor, shall solicit acceptances of such plan;

(v) fixes the scope and format of the notice to be provided regarding the hearing on approval of the disclosure statement; or

(vi) provides that the hearing on approval of the disclosure statement may be combined with the hearing on confirmation of the plan.

* * *

§ 525. Protection against discriminatory treatment

(a) Except as provided in the Perishable Agricultural Commodities Act, 1930, the Packers and Stockyards Act, 1921, and section 1 of the Act entitled "An Act making appropriations for the Department of Agriculture

for the fiscal year ending June 30, 1944, and for other purposes," approved July 12, 1943, a governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to. condition such a grant to, discriminate with respect to such a grant against, deny employment to, terminate the employment of, or discriminate with respect to employment against, a person that is or has been a debtor under this title or a bankrupt or a debtor under the Bankruptcy Act, or another person with whom such bankrupt or debtor has been associated, solely because such bankrupt or debtor is or has been a debtor under this title or a bankrupt or debtor under the Bankruptcy Act, has been insolvent before the commencement of the case under this title, or during the case but before the debtor is granted or denied a discharge, or has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act.

(b) No private employer may terminate the employment of, or discriminate with respect to employment against, an individual who is or has been a debtor under this title, a debtor or bankrupt under the Bankruptcy Act, or an individual associated with such debtor or bankrupt, solely because such debtor or bankrupt –

(1) is or has been a debtor under this title or a debtor or bankrupt under the Bankruptcy Act;

(2) has been insolvent before the commencement of a case under this title or during the case but before the grant or denial of a discharge; or

(3) has not paid a debt that is dischargeable in a case under this title or that was discharged under the Bankruptcy Act.

(c)(1) A governmental unit that operates a student grant or loan program and a person engaged in a business that includes the making of loans guaranteed or insured under a student loan program may not deny a grant, loan, loan guarantee, or loan insurance to a person that is or has been a debtor under this title or a bankrupt or debtor under the Bankruptcy Act, or another person with whom the debtor or bankrupt has been associated, because the debtor or bankrupt is or has been a debtor under this title or a bankrupt or debtor under the Bankruptcy Act, has been insolvent before the commencement of a case under this title or during the pendency of the case but before the debtor is granted or denied a discharge, or has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act.

(2) In this section, "student loan program" means the program operated under part B, D, or E of title IV of the Higher Education Act of 1965 or a similar program operated under State or local law.

STATE OF NEW HAMPSHIRE

WRIT OF SUMMONS

SUPERIOR COURT
HILLSBOROUGH, SS.

No. ___
( ) COURT
(X) JURY

David Wenners 55 No. River Road Manchester, N.H.	vs.	Great State Beverages, Inc. 459 E. Industrial Park Dr. Manchester, NH

To the Sheriff of any County or his Deputy:

WE COMMAND YOU TO SUMMON Great State Beverages, Inc. if to be found in your precinct, to appear at the SUPERIOR COURT at MANCHESTER in said County of Hillsborough, on the first Tuesday of April 1993, to answer to the plaintiff(s). IN A PLEA OF

IN AN AMOUNT WITHIN THE JURISDICTIONAL LIMIT OF THIS COURT To the damage of the plaintiff, as he says, the sum of dollars and make return of this writ with your doings therein.

Witness **RICHARD P. DUNFEY,** Esquire, 12th day of Feb. A.D. 1993

_____ Indorser
/s/ Michael B. Clougherty
By Michael B. Clougherty Attorney
70 Market St.
Manchester, NH 03101
668-7050

/s/ John M. Safford
Clerk of Superior Court.

True copy attest William M. Barry Deputy Sheriff

IN A PLEA OF THE CASE for that on or about July 24, 1991 and for approximately 19 years immediately preceding said date, your plaintiff, David Wenners, was an employee of the defendant, Great State Beverages, Inc., a corporation organized under the laws of the State of New Hampshire and with a principal place of business in Manchester, County of Hillsborough, State of New Hampshire; that as a result of plaintiff's employment with defendant there was an implied covenant that the parties would carry out their obligations in good faith, NEVERTHELESS, for that on or about said date, the defendant terminated plaintiff's employment with the defendant because plaintiff sought and obtained relief under the United States Bankruptcy Act as plaintiff was entitled to do and the plaintiff refused to transfer assets to the Chief Executive Officer and/or the President of the defendant corporation in violation of the Bankruptcy Act as he was repeatedly requested to do by said Chief Executive Officer and/or President of the defendant corporation; that the termination of plaintiff's employment by the defendant was motivated by bad faith, malice or retaliation, because he performed an act that public policy would encourage or refused to do something that public policy would condemn, namely, seeking relief under the US Bankruptcy Act and refusing to transfer assets to the Chief Executive Officer and/or President of the defendant corporation in violation of said act; that the plaintiff was wrongfully discharged from his employment without cause and after 19 years of service to defendant corporation; that by reason of defendant's improper conduct in causing plaintiff's termination, plaintiff has been deprived of the salary plaintiff would have received

for the remainder of plaintiff's working life to age 65; plaintiff was denied the benefit of a pension or retirement plan which would have resulted in distribution at the normal retirement age of 65; plaintiff was also denied basic health insurance coverage, comprehensive medical plan, salary continuation plan coverage, accident, sickness plan coverage, long term disability insurance, basic group life insurance, supplemental life insurance, travel, accident insurance, as well as employee retirement plan and supplemental income plan, vacation and holiday pay, and social security. In addition because of plaintiff's wrongful termination, plaintiff has been unable to find suitable comparable employment, plaintiff's ability to obtain such employment has been and will continue to be substantially impaired; plaintiff was denied severance pay and caused to suffer humiliation, anxiety, loss of morale and self-esteem, nervousness and loss of reputation; ALL TO THE DAMAGE OF THE PLAINTIFF AS HE SAYS IN AN AMOUNT WITHIN THE JURISDICTIONAL LIMIT OF THIS COURT;

COUNT II

Incorporating by reference the allegations set forth in COUNT I, the plaintiff states that the conduct of the defendant was outrageous and egregious, without excuse or justification, reckless and malicious, justifying an award of exemplary or enhanced damages, costs and counsel fees; ALL TO THE DAMAGE OF THE PLAINTIFF AS HE SAYS, IN AN AMOUNT WITHIN THE JURISDICTIONAL LIMIT OF THIS COURT.

STATE OF NEW HAMPSHIRE

HILLSBOROUGH, ss. NORTHERN DISTRICT	SUPERIOR COURT DOCKET NO. 93-C-326

DAVID A. WENNERS, Plaintiff, v. GREAT STATE BEVERAGES, INC., Defendant.	MOTION TO DISMISS AND INCORPORATED MEMORANDUM OF AUTHORITIES OF GREAT STATE BEVERAGES, INC.

Plaintiff David A. Wenners ("Wenners") has filed a two count Complaint under New Hampshire common law which alleges that he was wrongfully discharged from his employment with Great State Beverages, Inc. Defendant moves to dismiss Wenners' claims because they are (1) preempted by both the Bankruptcy and Supremacy clauses of the United States Constitution; and (2) not recognized by New Hampshire common law. The gravamen of Wenners' Complaint is that

> the defendant terminated plaintiff's employment with the defendant because plaintiff sought and obtained relief under the United States Bankruptcy Act as plaintiff was entitled to do so and the plaintiff refused to transfer assets to the Chief Executive Officer and/or the President of the defendant corporation in violation of the Bankruptcy Act. . . .

(Complaint). This cause of action arises exclusively under the federal Bankruptcy Act, 11 U.S.C. §525(b), and thus Wenners' claims must be dismissed as a matter of law.[1]

Article I, Section 8 of the Constitution of the United States provides that "(t)he Congress shall have power to . . . establish . . . *uniform* Laws on the subject of Bankruptcies throughout the United States; . . . " (emphasis supplied). In addition to the uniformity required by the Bankruptcy Clause, the Supremacy Clause of the United States Constitution (Art. VI, Sec. 2) also makes this law the supreme law of the land.[2] Application of state law under these allegations would destroy this constitutionally mandated uniformity which Congress has established.

Pursuant to this constitutional grant of power, Congress, in the Bankruptcy Amendments and Federal Judgeship Act of 1984, provided for a uniform wrongful discharge law which states that:

> No private employer may terminate the employment of, or discriminate with respect to employment against, an individual who is or has been a debtor under this title, a debtor or bankrupt under the Bankruptcy Act, . . . , solely because such debtor or bankrupt – (1) is or has been a

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[1] Wenners is, of course, free to replead his claims under the federal statute.

[2] Even before the advent of §525(b), the Supremacy Clause was used to invalidate as unconstitutional local employment regulations premised on bankruptcy status. ***Matter of Loftin,*** 327 So. 2d 543 (La. App. 1976); ***Rutledge v. City of Shreveport,*** 387 F. Supp. 1277, 1280-1281 (W. D. La. 1975).

> debtor under this title . . . or the Bankruptcy Act; . . . .

11 U.S.C. §525(b). To establish this federally required uniform body of law, Congress determined the elements of such a claim premising them on the bankruptcy being the *sole* reason for the employer's alleged discriminatory treatment. ***Id.; Laracuente v. Chase Manhattan Bank***, 891 F.2d 17 (1st Cir. 1989); ***Stockhouse v. Hines Motor Supply, Inc.***, 75 B.R. 83, 85 (D. Wyo. 1987) (plaintiff filed both § 525(b) claim and wrongful discharge claim (which was then abandoned)). Congress' edict leaves no room for plaintiff to invoke state common law in order to avoid the exclusive federal statutory claim and remedy.

Because Wenners' state law claim requires proof of different elements than the federal law claim, a conflict exists. Under federal law, a plaintiff's claim is defeated by showing that the bankruptcy was not the sole reason for the plaintiff's termination. ***Laracuente, supra.*** The state law claim might not be so defeated. Thus, plaintiff's theory would allow New Hampshire plaintiffs to recover on the same operative facts under which other states' plaintiffs could not and under which a federal plaintiff could not. To allow plaintiff's claim to proceed under state law would destroy the constitutionally mandated uniformity and would cause a direct collision between the United States Constitution and New Hampshire common law. The Bankruptcy and Supremacy Clauses resolve this conflict in favor of the federal claim.

Furthermore, even assuming the claims were identical, this matter would still be exclusively governed by federal law. "When Congress has taken the particular

subject matter in hand coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go further than Congress has seen fit to go." ***Charleston & W.C.R.Co. v. Varnville Furniture Co.,*** 237 U.S. 597, 604 (1915). Accordingly, as a matter of law, Wenners' claims are preempted by the United States Constitution. His Complaint should be dismissed.

Second, to the extent it is even relevant, Wenners has no common law claim for wrongful discharge under the alleged facts of this case. "(T)his cause of action exists only when there is no other adequate way to vindicate the public policy." ***Grubba v. Bay State Abrasives,*** 803 F.2d 746, 747, (1st Cir. 1986); ***Melley v. Gillette,*** 19 Mass. App. 511, 475 N.E. 2d 1227 (1985) (denial of public policy wrongful discharge claim based on age due to existence of statutory remedy).

> We think that where, as here, there is a comprehensive remedial statute, the creation of a new common law action based on the public policy expressed in that statute would interfere with that remedial scheme.

Melley, 19 Mass. App. at 513; ***See also, Magerer v. John Sexton & Co.,*** 912 F.2d 525 (1st Cir. 1990) (workers' compensation); ***Braun v. Kelsey-Hayes Co.,*** 635 F. Supp. 75 (E.D. Pa. 1986) (OSHA exclusive remedy/preemption); ***Crews v. Memorex Corp.,*** 588 F. Supp. 27, 29 (D. Mass. 1984) (age); ***Wehr v. Burroughs Corp.,*** 438 F. Supp. 1052, 1055 (E.D. Pa. 1977), ***aff'd.,*** 619 F.2d 276 (3d Cir. 1980) (age); ***McCluney v. Jos. Schlitz Brewing Co.,*** 489 F. Supp. 24, 26 (E.D. Wisc. 1980) (sex); ***Walsh v. Consolidated Freightways, Inc.,*** 563 P.2d 1205 (Ore. 1977) (OSHA retaliation). For an outstanding survey of the law in this area,

see Makovi v. Sherwin-Williams Co., 561 A.2d 179, 4 IER Cases 1364 (Md. Ct. App. 1989) (copy attached).

New Hampshire courts sustain this view. ***Howard v. Dorr Woolen Co.***, 120 N.H. 295, 414 A.2d 1273 (1980); ***Cilley v. New Hampshire Ball Bearings***, 514 A.2d 818, 821-822 (1986). ***Howard*** teaches that where there is a pre-existing statutory remedy for discrimination, there is no wrongful discharge claim and the plaintiff's remedy is limited to that exclusively provided by statute. Moreover, the ***Howard*** Court also held that discrimination claims, similar to this plaintiff's, do not fit within the public policy rubric established in ***Monge v. Beebe Rubber Co.***, 114 N.H. 130, 316 A.2d 549 (1974). Accordingly, Wenners' Complaint should be dismissed.

In conclusion, this Motion raises very serious constitutional issues which require that this Motion be granted in order to preserve and protect the integrity of the federal Constitution and the United States Bankruptcy Code. In addition, New Hampshire law does not recognize Wenners' claims.

Dated July 19, 1993
Portland, Maine

Respectfully submitted,

/s/ Peter Bennett
Peter Bennett
Attorney for Defendant

HERBERT H. BENNETT AND ASSOCIATES, P.A.
121 MIDDLE STREET, SUITE 300
P.O. BOX 7799
PORTLAND, ME 04112-7799
(207) 773-4775

Dated July ___, 1993
Londonderry, New Hampshire

_____,
John R. Michels
Attorneys for Defendant

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2387n

BANKRUPTCY REFORM ACT OF 1978

P.L. 95-598

BANKRUPTCY REFORM ACT OF 1978

P.L. 95-598, see page 92 Stat. 2549

House Report (Judiciary Committee)
No. 95-595, Sept. 8, 1977
[To accompany H.R. 8200]

Senate Report (Judiciary Committee)
No. 95-989, July 14, 1978
[To accompany H.R.S. 2266]

Cong. Record Vol. 124 (1978)

DATES OF CONSIDERATION AND PASSAGE

House February 1, September 28, October 6, 1978

Senate September 7, 22, October 5, 1978

The House bill was passed in lieu of the Senate bill after amending its language to contain much of the text of the Senate bill. The Senate Report (this page) and the House Report (p. 5963) are set out.

SENATE REPORT NO. 95-989

* * *

[page 29]

§ *105. Power of court*

Section 105 is derived from section 2a(15) of present law, with two changes. First, the limitation on the power of a bankruptcy judge (the power to enjoin a court being reserved to the district judge) is removed as inconsistent with the increased powers and jurisdiction of the new bankruptcy court. Second, the bankruptcy judge is prohibited from appointing a receiver in a case under title 11

under any circumstances. The bankruptcy code has ample provision for the appointment of a trustee when needed. Appointment of a receiver would simply circumvent the established procedures.

This section is also anauthorization [sic], as required under 28 U.S.C. 2283, for a court of the United States to stay the action of a State court. As such, *Toucey v. New York Life Insurance Company,* 314 U.S. 118 (1941),[2] is overruled.

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[2] 62 S.Ct. 139, 86 L.Ed. 100.

* * *

[page 81]

Section 525. Protection against discriminatory treatment

This section is additional debtor protection. It codifies the result of *Perez v. Campbell,* 402 U.S. 637 (1971),[14] which held that a State would frustrate the Congressional policy of a fresh start for a debtor if it were permitted to refuse to renew a drivers license because a tort judgment resulting from an automobile accident had been unpaid as a result of a discharge in bankruptcy.

Notwithstanding any other laws, section 525 prohibits a governmental unit from denying, revoking, suspending, or refusing to renew a license, permit, charter, franchise, or other similar grant to, from conditioning such a grant to, from discrimination with respect to such a grant against, deny employment to, terminate the employment of, or discriminate with respect to employment against, a person that is or has been a debtor or that

---

[14] 91 S.Ct. 1704, 29 L.Ed.2d 233.

is or has been associated with a debtor. The prohibition extends only to discrimination or other action based solely on the basis of the bankruptcy, on the basis of insolvency before or during bankruptcy prior to a determination of discharge, or on the basis of nonpayment of a debt discharged in the bankruptcy case (the *Perez* situation). It does not prohibit consideration of other factors, such as future financial responsibility or ability, and does not prohibit imposition of requirements such as net capital rules, if applied nondiscriminatorily.

In addition, the section is not exhaustive. The enumeration of various forms of discrimination against former bankrupts is not intended to permit other forms of discrimination. The courts have been developing the *Perez* rule. This section permits further development to prohibit actions by governmental or quasi-governmental organizations that perform licensing functions, such as a State bar association or a medical society, or by other organizations that can seriously affect the debtors' livelihood or fresh start, such as exclusion from a union on the basis of discharge of a debt to the union's credit union.

The effect of the section, and of further interpretations of the *Perez* rule, is to strengthen the anti-reaffirmation policy found in section 524(b). Discrimination based solely on nonpayment could encourage reaffirmations, contrary to the expressed policy.

The section is not so broad as a comparable section proposed by the Bankruptcy Commission, S. 236, 94th Cong., 1st Sess. § 4-508 (1975), which would have extended the prohibition to any discrimination, even by private parties. Nevertheless, it is not limiting either, as noted. The courts will continue to mark the contours of

the anti-discrimination provision in pursuit of sound bankruptcy policy.

* * *

BANKRUPTCY REFORM ACT OF 1978

P.L. 95-598

HOUSE REPORT NO. 95-595

* * *

[page 316]

§ *105. Power of court*

Section 105 is derived from section 2a(15) of present law, with two changes. First, the limitations on the power of a bankruptcy judge (powers that were reserved to the district judge) are removed as inconsistent with the separation of the two courts and the increased powers and jurisdiction of the new court. *But see* H.R. 8200 § 405(a)(1) for limitations during the transition period. Second, the bankruptcy judge is prohibited from appointing a receiver in a case under title 11 under any circumstances. The bankrupty [sic] code has ample provision for the appointment of trustees when needed. Any appointment of a receiver would simply circumvent the established procedures.

Section 105 is similar in effect to the All Writs Statute, 28 U.S.C. 1651, under which the new bankruptcy courts are brought by an amend- [page 317] ment to 28 U.S.C. 451. H.R. 8200 § 213. The section is repeated here for the sake of continuity from current law and ease of reference, and to cover any powers traditionally exercised by a bankruptcy court that are not encompassed by the All Writs Statute.

This section is also an authorization, as required under 28 U.S.C. 2283, for a court of the United States to stay the action of a State court. As such, *Toucey v. New York Life Insurance Company*, 314 U.S.C. 118 (1941), is overruled.

* * *

[p. 366]

§ 525. *Protection against discriminatory treatment*

This section is additional debtor protection. It codifies the result of *Perez v. Campbell*, 402 U.S. 637 (1971), which held that a State would frustrate the Congressional policy of a fresh start for a debtor if it were permitted to refuse to renew a drivers license because a tort judgment resulting from an automobile accident had been unpaid as a result of a discharge in bankruptcy.

Notwithstanding any other laws, section 525 prohibits a governmental unit from denying, revoking, suspending, or refusing to renew a license, permit, charter, franchise, or other similar grant to, from conditioning such a grant to, from discrimination with respect to such a grant against, deny employment to, terminate the employment of, or discriminate with respect to employment against, a person that is or has been a debtor or that is or has been associated with a debtor. The prohibition extends only to discrimination or other action based solely [page 367] on the basis of the bankruptcy, on the basis of insolvency before or during bankruptcy prior to a

determination of discharge, or on the basis of nonpayment of a debt discharged in the bankruptcy case (the *Perez* situation). It does not prohibit consideration of other factors, such as future financial responsibility or ability, and does not prohibit imposition of requirements such as net capital rules, if applied nondiscriminatorily.

In addition, the section is not exhaustive. The enumeration of various forms of discrimination against former bankrupts is not intended to permit other forms of discrimination. The courts have been developing the *Perez* rule. This section permits further development to prohibit actions by governmental or quasi-governmental organizations that perform licensing functions, such as a State bar association or a medical society, or by other organizations that can seriously affect the debtors' livelihood or fresh start, such as exclusion from a union on the basis of discharge of a debt to the union's credit union.

The effect of the section, and of further interpretations of the *Perez* rule, is to strengthen the anti-reaffirmation policy found in section 524(b). Discrimination based solely on nonpayment could encourage reaffirmations, contrary to the expressed policy.

The section is not so broad as a comparable section proposed by the Bankruptcy Commisison [sic], H.R. 31, 94th Cong., 1st Sess. § 4-508 (1975), which would have extended the prohibition to any discrimination, even by private parties. Nevertheless, it is not limiting either, as noted. The courts will continue to mark the contours of the anti-discrimination provision in pursuit of sound bankruptcy policy.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

November 6, 1995

Mr. Peter Bennett
121 Middle Street
P.O. Box 7799
Portland, ME 04112-7799

Re: Great State Beverages, Inc.
v. David Wenners
Application No. A-404

Dear Mr. Bennett:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Souter, who on November 6, 1995, extended the time to and including January 16, 1996.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk

By /s/ Ruth Jones
Ruth Jones
Assistant Clerk

NOTIFICATION LIST

Mr. Peter Bennett
121 Middle Street
P.O. Box 7799
Portland, ME 04112-7799

Mr. Michael B. Clougherty
Kelliher & Clougherty
616 Beech Street
Manchester, NH 03104

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